No. 85-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NANTAHALA POWER AND LIGHT COMPANY,
TAPOCO, INC., and
ALUMINUM COMPANY OF AMERICA,

Appellants,

v.

STATE OF NORTH CAROLINA ex rel.
UTILITIES COMMISSION; LACY H.
THORNBURG, Attorney General,
et al.,

Appellees.

On Appeal from the Supreme Court
of North Carolina

APPELLANTS' BRIEF

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QUESTIONS PRESENTED

Under the Federal Power Act, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate wholesale electric rates and to allocate wholesale power supplies and their costs among different States. This case presents two closely-related questions involving the power of state regulatory commissions to nullify FERC's regulation and otherwise to burden the transmission and wholesale sale of electric power across state lines:

1. Whether the Federal Power Act permits a state regulatory commission, in setting retail rates within the state's borders, to reject the interstate wholesale cost and power allocations that FERC regulates and, in this case, actually approved?

2. Whether the Commerce Clause permits a state regulatory commission to give its citizens a "first call" preference on the inexpensive hydroelectric power generated in a multi-state area?

PARTIES BELOW

The appellants in the North Carolina Supreme Court were Nantahala Power and Light Company, Tapoco, Inc., and Aluminum Company of America.

The appellees were State of North Carolina *ex rel.* Utilities Commission: Lacy H. Thornburg, Attorney General; Public Staff of the North Carolina Utilities Commission; Henry J. Truett; Town of Bryson City; Swain County Board of County Commissioners; Cherokee County; Graham County; Jackson County; Town of Andrews; Town of Dillsboro; Town of Robbinsville; Town of Sylva; Tribal Council of the Eastern Band of Cherokee Indians; Muriel Maney; and Derol Crisp.

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APPELLANTS' BRIEF[1]

OPINIONS BELOW

The opinion and judgment of the North Carolina Supreme Court is reproduced in the Appendix to the Jurisdictional Statement ("App.") (1a–138a) and is reported at 313 N.C. 614 and 332 S.E.2d 397. The opinion of the North Carolina Court of Appeals (App. 141a–164a) is reported at 65 N.C. App. 198 and 309 S.E.2d 473. The opinions of the North Carolina Utilities Commission, dated September 2, 1981 (App. 165a–235a), and January 28, 1982 (App. 236a–247a) are unreported. In addition, the pertinent portions of the following decisions of FERC that were issued in a parallel proceeding are reproduced in the Appendix to

[1]The Statement of Appellants Required by Rule 28.1 appears at p. ii of the Jurisdictional Statement.

the Jurisdictional Statement: the FERC decision asserting jurisdiction over the allocation contract (App. 262a–266a), which is reported at 13 FERC ¶ 61,192 (CCH); the FERC Administrative Law Judge decision (App. 267a–282a), which is reported at 15 FERC ¶ 63,014 (CCH); FERC Opinion No. 139 (App. 283a–301a), which is reported at 19 FERC ¶ 61,152 (CCH); and FERC Opinion No. 139-A (App. 302a–313a), which is reported at 20 FERC ¶ 61,430 (CCH).

JURISDICTION

The final judgment of the North Carolina Supreme Court was entered on July 3, 1985. Nantahala's Notice of Appeal (App. 315a–316a) and Alcoa's Notice of Appeal (App 317a) were each filed in the Supreme Court of North Carolina on July 23, 1985. Tapoco's Notice of Appeal (App. 318a) was filed on September 23, 1985. This Court has jurisdiction under 28 U.S.C. § 1257(2). Probable jurisdiction was noted on December 9, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Article VI, Clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

The United States Constitution, Article I, Section 8, Clause 3: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ."

The pertinent provisions of the Federal Power Act, 16 U.S.C. §§ 791a–828c, and of the North Carolina Public Utilities Act, N.C. Gen. Stat. §§ 62-1, *et seq.*, are reproduced in the Appendix to the Jurisdictional Statement (App. 248a–261a). In addition, the terms of Section 313 of the Federal Power Act (16 U.S.C. § 825*l*(b)) appear in the Appendix to this Brief.

STATEMENT OF THE CASE

Introduction

Under the Federal Power Act, the Federal Energy Regulatory Commission ("FERC") has the exclusive jurisdiction to regulate the transmission and wholesale sale of electricity in interstate commerce. This case presents the question whether a State may use its separate authority over retail rates to nullify this FERC regulation and give that state's citizens a "first call" preference to the hydroelectric power generated in a multi-state area.

As FERC has stated, the issue arises in the context of a "classic dispute" between two States over how a pool of low-cost power is to be allocated between them.[2] Nantahala Power and Light Company (Nantahala) is a subsidiary of Aluminum Company of America (Alcoa) that sells electricity to retail customers and three wholesale customers in western North Carolina. Tapoco, Inc. (Tapoco) is an Alcoa subsidiary that sells electricity to an Alcoa aluminum plant in eastern Tennessee exclusively. Each utility and each set of customers have two power sources—low-cost TVA "entitlements" power and expensive TVA purchased power. Each State and each set of customers would prefer to have as much as possible of the low-cost entitlements power, and as little as possible of the high-cost purchased power. Because FERC's rate schedules determine how the power supplies and costs are allocated between these States, Nantahala's customers instituted proceedings before FERC in which they unsuccessfully contended that FERC should modify the pertinent rate schedules to give North Carolina far more of the low-cost power. The North Carolina Attorney General represented Nantahala's retail customers throughout these extensive proceedings.

[2]Brief for the United States and the Federal Energy Regulatory Commission As Amici Curiae In Support of Jurisdictional Statement (October, 1985), p. 9.

However, North Carolina has refused to give effect to the FERC rate schedules and decisions in setting Nantahala's retail rates. Instead, it used its retail ratemaking powers to "effectively allocate" greater costs to Tennessee (App. 69a–70a) and impose the very preferential cost and power allocations that FERC's regulation had rejected.

1. **Background: The New Fontana Agreement And 1971 Apportionment Agreement.** Nantahala, Tapoco, and the Tennessee Valley Authority (TVA) are each engaged in the generation of hydroelectric power on the Little Tennessee River and its tributaries. Pursuant to its statutory authority to develop and control this watershed, TVA owns and operates the Fontana dam in North Carolina, which is the largest hydroelectric generating facility in the eastern half of the United States. Nantahala owns a number of plants in North Carolina, which are upstream from TVA's Fontana dam. Tapoco owns two plants in Tennessee and two plants in North Carolina, which are downstream from the Fontana dam.[3]

In 1962, TVA, Nantahala, Tapoco, and Alcoa entered into a power coordination and exchange agreement, which has been called the New Fontana Agreement (sometimes referred to as "NFA").[4] App. 14a–15a, 28a–29a. Under this agreement, TVA both controls the generation of power at Nantahala's and Tapoco's facilities and receives all the electricity that is generated. In return, TVA provides Nantahala and Tapoco collectively with fixed entitlements to electric power. These consist of both "capacity entitlements" in megawatts ("mW")[5] and "energy entitlements" in megawatt-hours ("mWh").[6] See App. 14a–15a, 28a–29a, 216a. Because Nantahala and Tapoco are exchanging their actual generation, which varies substantially with stream flow, for more consistently available TVA power, the TVA entitlements are less than Nantahala's and Tapoco's actual generation of electricity in most years. The energy and capacity that TVA retains under the NFA is essentially a "bankers' fee," which compensates TVA for the obligations and risks that it assumed.[7]

In 1971, Nantahala and Tapoco entered into the 1971 Apportionment Agreement. It prescribes how the TVA entitlement power is divided between the two utilities and the two States.[8] This agreement assigned Nantahala 54.3 mW in capacity entitlements and 360 thousand mWh in energy entitlements annually for use in serving its North Carolina customers. Tapoco is assigned the remaining NFA energy and capacity entitlements to serve its Tennessee customer.

The New Fontana Agreement and 1971 Apportionment Agreement are interstate wholesale power exchange agreements subject to FERC's jurisdiction under Part II of the Federal Power

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[3]Tapoco has a license under Part I of the Federal Power Act that expressly authorizes it to operate these plants to supply power to the Alcoa aluminum plant in Alcoa, Tennessee. App. 272a–273a.

[4]The NFA superseded the Original Fontana Agreement (OFA), which was in effect between 1941 and 1962.

[5]Capacity entitlements determine the amounts of energy that Nantahala and Tapoco/Alcoa may demand at any one time, without incurring the costs of supplemental high-cost power from TVA. Thus, the companies incur far greater costs per megawatt for the difference between (1) their peak demands (the particular hour and day when their consumptions are the highest) and (2) their lower capacity entitlements. See App. 28a, 31a.

(Footnote continued on next page)

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[6]Energy entitlements determine the total amounts of energy that the two firms may obtain annually from TVA under the contracts. See App. 28a, 31a. To the extent that these amounts are exceeded, the firms incur the costs of supplemental high-cost TVA purchased power.

[7]Under the NFA, TVA has an obligation to provide constant and levelized amounts of power, regardless of differences between the timing of the generation of electricity at each of the utilities' facilities and the demand of the utilities. With its huge electrical system, TVA is able to act as a banker and provide Nantahala and Tapoco with entitlement power at times when the generation by their own facilities is insufficient because of steam flow variations.

[8]Prior to 1971, Alcoa also purchased power from Nantahala, under a 1963 agreement that effectively defined Nantahala's share of the entitlements. App. 30a.

Act. See App. 262a–266a; see also App. 72a.[9] FERC has denominated the New Fontana and 1971 Apportionment Agreements as Nantahala's FERC Wholesale Rate Schedule No. 1.[10] App. 72a.

Between 1962 and 1971, Nantahala's entitlements were sufficient to serve all the needs of Nantahala's public customers. App. 30a. However, the demand for electricity in western North Carolina has steadily increased, and in 1971, Nantahala began to purchase additional, more expensive power from TVA. By 1975, this additional expensive power cost 18.5 mils per kWh (see App. 32a)—or more than three times the cost per kWh of the entitle-

[9]The North Carolina Supreme Court's opinion correctly states that there were questions involving the applicability of particular provisions of the Federal Power Act to Tapoco and Nantahala during the period between 1930 and the early 1960s. App. 18a–26a, 29a. These disputes are irrelevant to this case. They pertained to whether the Little Tennessee River or specific tributaries are "navigable," within the meaning of Part I of the Act (16 U.S.C. §§ 791a–823a) (App. 18a–26a) and whether, *prior* to this Court's decision in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), the OFA and the NFA (each of which was filed at the Commission) had sufficient impact on interstate commerce to be regulated as a rate schedule under Part II of the Act (16 U.S.C. §§ 824–828c.) (App. 29a).

Similarly, while there was also a subsequent dispute over the federal regulation of the 1971 Apportionment Agreement (see App. 31a), it was purely technical. It involved *how* the agreement would be regulated, not *whether* it would be regulated under the Federal Power Act. For example, while the 1971 Allocation was not technically filed as a Section 205 rate schedule until 1980, FERC made the filing of the agreement as a rate schedule effective retroactive to 1971. This reflected that the agreement had been on file with the Commission, and had been the basis for FERC's regulation, since the early 1970s. Tr. Vol. 7, pp. 44–45. See also Brief of Federal Energy Regulatory Commission, *Nantahala Power & Light Co.* v. *FERC*, Nos. 82-1872(L), 82-1896, 82-2032, 82-2131, 82-1904, & 82-1948 (4th Cir.) (filed April 1, 1983), p. 19.

[10]These are also denominated Tapoco FERC Wholesale Rate Schedule No. 3. App. 72a, 263a.

ment power (which is less than 6 mils per kWh). See Ex. RDB-R2; Tr. Vol. 3, p. 3.[11]

In 1976, Nantahala sought to increase its rates. It filed a request with FERC to increase its charges to its three wholesale customers and a separate request with the North Carolina Utilities Commission to increase its charges to its retail customers. App. 7a, 269a. A common fact underlying each of these proceedings is that Nantahala's costs of obtaining power for resale to both sets of customers are determined by the FERC-regulated New Fontana and 1971 Apportionment Agreements. Nantahala's wholesale and retail customers both sought to avoid rate increases, and obtain refunds, by asserting claims that these agreements were unfair. Each group of customers contended that the agreements should be modified or disregarded and that greater amounts of inexpensive entitlements power should be allocated to North Carolina. This led to a formal FERC investigation of the fairness and reasonableness of these agreements to Nantahala and its customers under Section 206 of the Federal Power Act.

2. **The FERC Investigation Of The Agreements Under Section 206.** This investigation was instituted by Nantahala's wholesale customers in 1978 when they filed a formal complaint with FERC against Alcoa, Tapoco, and Nantahala and sought relief under Section 206 of the Federal Power Act. See App. 256a–257a. The North Carolina Attorney General intervened in this FERC complaint proceeding on behalf of the "using and consuming public in North Carolina."[12]

[11]Nantahala bears its own costs of generation under the NFA. Thus, the unit cost of the entitlement power is determined by dividing Nantahala's costs of operating its generating facilities by the volume of the entitlement power allocated to Nantahala. In contrast, Nantahala pays for the power purchased from TVA.

[12]Tr. 163, FERC Dockets EL78-18 & ER76-828. The complaint proceeding was consolidated with Nantahala's separate 1976 request for an increase in the rates to its three wholesale customers. See *supra*.

Nantahala's retail and wholesale customers contended that Alcoa had manipulated the terms of the New Fontana Agreement and 1971 Apportionment Agreement to benefit Alcoa's aluminum production operations in Tennessee at the expense of Nantahala's North Carolina customers. After a five-week evidentiary hearing before an Administrative Law Judge in which all the transactions among affiliates were carefully scrutinized (App. 267a–282a), FERC considered and rejected most of the North Carolina customers' claims under Section 206 of the Act.

FERC rejected the claims that the New Fontana Agreement was unfair to Nantahala and had improperly traded off the needs of Nantahala's wholesale and retail customers in North Carolina to benefit Alcoa's plant in Alcoa, Tennessee. App. 293a–295a. FERC found that there was "no intent [in the New Fontana Agreement] to ignore the needs of Nantahala's public service customers or deprive them of energy at just and reasonable rates." App. 295a. It thus treated this agreement as establishing the entitlements to inexpensive power that Nantahala and Tapoco could divide. FERC also specifically rejected the claims that Alcoa "used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act" and that the North Carolina and Tennessee entities should be "rolled-in" and regulated as a single integrated system. App. 291a.

FERC then turned to the 1971 Apportionment Agreement. It approved the allocation of 54.3 mW of capacity entitlements to Nantahala, finding it to be fair and reasonable. App. 297a. However, FERC concluded that the record did not support the fairness of the 1971 Apportionment Agreement's allocation of 360 thousand mWh of energy entitlements to Nantahala, and FERC then decided how much greater that share would be, increasing this allocation to 404 thousand mWh. App. 298a. In its final order in this complaint and rate proceeding, FERC affirmed the Administrative Law Judge's determination that the "just and reasonable rates and

charges are those which are in conformity with the findings and conclusions set forth in [its] decision." App. 282a; see App. 301a.

Both Nantahala's retail customers, again represented by the North Carolina Attorney General, and Nantahala's wholesale customers appealed these FERC determinations to the United States Court of Appeals for the Fourth Circuit. Nantahala also appealed FERC's order. The Fourth Circuit affirmed FERC's order in its entirety. *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342 (4th Cir. 1984).

3. **The North Carolina Retail Rate Proceedings.** In the retail rate case that had been filed in 1976, the North Carolina Utilities Commission ("NCUC") set Nantahala's retail rates by determining its overall retail revenue requirements in the 1975 test year. In its initial decision in 1977, the NCUC had agreed that the FERC-regulated rate schedules and power supply agreements determined one aspect of these retail revenue requirements—Nantahala's reasonable costs of obtaining power for resale to its retail customers—and the NCUC approved the retail rate increase.[13] However, in 1980, the North Carolina Supreme Court reversed this decision. It held that Nantahala's public customers should "have in effect, [a] 'first claim' on all energy actually generated by Nantahala's facilities" and remanded Nantahala's rate case to the NCUC to consider whether the FERC-regulated contractual arrangements are "in the best interests of the customers of Nantahala." *North Carolina ex rel. Utilities Commission v. Edmisten*, 299 N.C. 432, 434, 438, 263 S.E.2d 583, 586, 588 (1980).

On remand, in 1981, the NCUC proceeded to make its own determinations of the very interstate cost and power allocation

[13]Indeed, the NCUC had previously found the New Fontana Agreement and the 1971 Apportionment Agreement to be "reasonable," and the North Carolina Supreme Court had accepted that finding in an earlier appeal. *North Carolina ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 575, 232 S.E.2d 177, 179 (1977).

issues that were then being litigated before FERC. This meant that the fairness of the NFA and the 1971 Apportionment Agreements were being simultaneously investigated by two agencies: FERC, which has jurisdiction to consider the issue, and the NCUC, which does not.[14]

The NCUC's decision was issued in September 1981, and reaffirmed in January 1982. App. 165a–247a. In setting the retail rates, the NCUC refused either to give effect to the Nantahala FERC rate schedules, as filed, or to make provisions in the retail rate orders for FERC's ultimate determinations in the then-pending complaint proceeding under Section 206 of the Federal Power Act.[15] Instead, the NCUC set rates on the basis of a radically different interstate costs allocation, which assigned Nantahala far more of the low-cost power than had FERC's regulation.

The NCUC achieved these greater allocations by going beyond the North Carolina Supreme Court's earlier mandate that North

[14]Alcoa and Tapoco filed suit in federal district court on January 25, 1982 (prior to the final NCUC decision) seeking to enjoin threatened NCUC action on the ground that it interfered with the operation of the Federal Power Act and impermissibly burdened interstate commerce. The District Court and Fourth Circuit held that abstention principles precluded the District Court from adjudicating these claims and did not address the merits of the preemption or Commerce Clause issues. See *Aluminum Company of American* v. *Utilities Comm'n*, 713 F.2d 1024, 1028-30 (4th Cir. 1983). This Court denied Alcoa's petition for certiorari with Justices Brennan and White noting that they would have granted the petition. 104 S. Ct. 1326 (1984).

[15]At the time of the NCUC's final decision in January, 1982, the FERC Administrative Law Judge's decision had been issued, but it was not affirmed by FERC until May, 1982.

In this circumstance, a state utility commission can protect all legitimate ratepayer interests by permitting retail rates to go into effect on the assumption that the FERC rate schedule is reasonable, but requiring the utility "to reimburse the individual consumers for any . . . costs which may be disallowed" as a result of a future ruling by FERC. See *Narragansett Elec. Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358, 1363 (1977), *cert. denied*, 435 U.S. 972 (1978).

Carolina be given a "first claim" on all the hydroelectric energy generated in North Carolina by Nantahala. Instead, the NCUC, in its words, gave "North Carolina's public load" a "first call" preference to the "total electric energy output of the combined [Nantahala-Tapoco] system," thus applying North Carolina customers' preference to low-cost power generated by Tapoco in Tennessee and North Carolina as well as to Nantahala's North Carolina generation. App. 183a; see *id.* 240a. As the intervenor witness who sponsored the NCUC's methodology testified, under the projections for the growth in Nantahala's demand, the NCUC's methodology would mean that there would be no low-cost hydroelectric power left for Tennessee within eight years. Tr. Vol. 7, pp. 38–39.

The NCUC determined Nantahala's costs of power by developing an assumed pool of power supply costs and multiplying it by an allocation factor, the product of which nominally represented Nantahala's share of that pool of costs. The preference for North Carolina results from three interrelated aspects of the NCUC's methodology, *each* of which is inconsistent with FERC's explicit findings and regulation.

First, contrary to FERC's jurisdictional determination that Nantahala and Tapoco are not a single entity (App. 262a–266a, 291a),[16] the NCUC nonetheless developed the assumed pool of

[16]FERC's jurisdiction over the 1971 Apportionment Agreement, and the arrangements under which the TVA entitlements are allocated between North Carolina and Tennessee, depended on the existence of separate wholesale exchanges of bulk power supplies between TVA and Nantahala on the one hand and between TVA and Tapoco on the other. If Nantahala and Tapoco were regulated as a single entity, FERC would have had jurisdiction only over the NFA and not over the 1971 Apportionment Agreement. See also p. 33 n. 46, *infra*.

Thus, when FERC initially accepted the 1971 Apportionment Agreement for filing as part of the Nantahala Rate Schedule No. 1 in 1980, Nantahala's retail and wholesale customers urged, and FERC agreed, to make this jurisdictional determination subject to FERC's ultimate finding in the then-pending complaint proceeding on whether

(Footnote continued on next page)

costs by combining or "rolling-in," the two companies' costs and power supplies into a hypothetical "Alcoa power system." However, the hypothetical system costs that the NCUC created included only the low-cost power of Nantahala and Tapoco and Nantahala's purchases of high-cost TVA power. By excluding Tennessee's (*i.e.*, Alcoa's) purchases of high-cost power, the NCUC assured that greater amounts of low-cost power would be allocated to North Carolina.[17] Concomitantly, by making Tennessee's high-cost power its *sole* responsibility and dividing North Carolina's high-cost power between the two States, the NCUC assured that 75% of the high-cost North Carolina power would be paid for by Tennessee. See App. 219a–220a.

(Footnote continued from previous page)

Tapoco and Nantahala should be "rolled-in." App. 264a–265a; see FERC Docket No. ER81-19-000, Town of Highlands' Protest, Petition To Intervene, Motion for Five Month Suspension Period, Motion To Compel Filing of Supporting Data, And Motion To Toll The Suspension Period Until Supporting Data Is Filed (filed Nov. 12, 1980); *id.*, Petition By The State Of North Carolina To Intervene Out Of Time, Protest, Motion For Five Month Suspension Period, Motion To Compel The Filing Of Supporting Data, And Motion To Toll The Suspension Period Until Supporting Data Is Filed (filed Nov. 25, 1980).

[17]Tapoco, Nantahala, and their respective customers together have four sources of power. Two of them are low-cost and two are not. They are: 1) Nantahala's entitlements from TVA, 2) Tapoco's entitlements from TVA, 3) Nantahala's purchases from TVA, and 4) Alcoa's purchases from TVA delivered to it by Tapoco. The Commission "rolled-in" only the first three. It left out Alcoa's expensive purchases from TVA (App. 211a; see App. 66a) and thereby assured that North Carolina's share of the low-cost power would be inflated.

The NCUC acknowledged that Alcoa's TVA purchases were excluded because they were so large as to "warp and twist" its allocation methodology. App. 215a. In fact, Alcoa's average cost of power from low-cost hydroelectric power and expensive TVA purchases is higher than Nantahala's. See Tr. Vol. 14, p. 70. Thus, if Alcoa's TVA purchases were included in the roll-in, the costs allocated to North Carolina would have exceeded Nantahala's costs under the NFA and the 1971 Apportionment Agreement. See App. 66a.

Second, contrary to FERC's determination that Nantahala's share of the low-cost power should be determined by its percentage of the actual generation turned over to TVA (App. 297a–298a),[18] the NCUC determined North Carolina's percentage share on the basis of Nantahala's customers' total, and ever-increasing needs. Specifically, the NCUC developed Nantahala's allocation factors by taking its peak load and its total annual requirements for energy and dividing them by the combined system's assumed available capacity and energy. This assured that North Carolina's percentage share of the low-cost power will increase, and Tennessee's will decline, whenever North Carolina's needs increase. In fact, North Carolina's needs have increased, and will continue to do so. Thus, when the identical methodology was applied in a subsequent rate case involving a 1979 test year,[19] the intervening increases in Nantahala's need for power resulted in even greater allocations of low-cost power to Nantahala and to North Carolina.

Third, contrary to FERC's determination that the New Fontana Agreement is fair and reasonable to Nantahala (App. 293a–295a), the NCUC found it unlawfully preferred Tapoco/Alcoa's interests to Nantahala's and should be disregarded in determining Nantahala's share of the low-cost power. On this basis, the NCUC determined Nantahala's total share of the low-cost power by applying Nantahala's assumed percentage—and only Nantahala's—not to Nantahala's and Tapoco's actual entitlements under the New Fontana Agreement, but rather to hypothetical larger amounts that include generation

[18]FERC based Nantahala's allocation on the proportion that the average generation of Nantahala's facilities bore to the total average generation of the Nantahala and Tapoco facilities that were turned over to TVA. The factor was applied against the total TVA entitlements under the NFA. App. 297a–298a.

[19]See *North Carolina ex rel. Utilities Commission* v. *Nantahala Power and Light Co.*, 314 N.C. 246, 333 S.E.2d 217 (1985), notice of probable jurisdiction pending, No. 85-1165 (filed January 10, 1986) (applying same methodology to 1979 test year).

that TVA retained as a "bankers' fee" and was therefore never available to Nantahala or Tapoco. See p. 5 & n. 7, *supra*.[20] Because Tennessee receives only what is left, the sole beneficiary of the NCUC's paper increase in the amount of low-cost power is North Carolina.

The following chart shows NCUC's energy and capacity allocations, and how they give Nantahala radically more of the low-cost power than has FERC's regulation:

	Nantahala's Capacity Allocation	Nantahala's Energy Allocation
FERC Nantahala Rate Schedule No. 1 as filed .	54.3 mW	360 thousand mWh
As Adjusted by FERC Decisions	54.3 mW	404 thousand mWh
NCUC Allocation for 1975 Test Year	92.7 mW[21]	433 thousand mWh[22]
NCUC Allocation for 1979 Test Year	100.1 mW[23]	460 thousand mWh[24]

As the North Carolina Supreme Court stated, the "practical effect" of the NCUC Order in the 1976 rate case is that Nantahala was barred from recovering all of the wholesale costs "associated with" the FERC-regulated NFA and 1971 Apportionment Agreement. See App. 69a. Indeed, in this case, the NCUC's decision to refuse to give effect to the cost and power allocations

[20] For example, the NCUC assumed that Nantahala and Tapoco had a total of 376.9 mW of inexpensive hydroelectric capacity (App. 219a), which is greatly in excess of the 218.3 mW in capacity entitlements provided by TVA under the NFA.

[21] 92.7 mW is 24.6% of the 376.9 mW of the assumed hydroelectric capacity allocated to Nantahala in the 1975 test year. App. 219a-220a.

[22] 433 thousand mWh is 24.51% of the 1,765,100 mWh of assumed hydroelectric energy allocated to Nantahala. App. 220a-221a.

[23] See p. 13 n. 19, *supra* & Appendix to Jurisdictional Statement in No. 85-1165, p. 70a (26.56% times 376.9 mW).

[24] See p. 13 n. 19, *supra* & Appendix to Jurisdictional Statement in No. 85-1165, p. 71a (26.06% times 1,765,100 mWh).

contained in the FERC rate schedules led to the *direct* exclusion of $2 million of the wholesale costs that Nantahala incurred as a result of the FERC rate schedules from Nantahala's retail revenue requirements in the 1975 test year, reducing these revenue requirements from $11 million to $9 million. App. 234a. This reduction, in turn, led the NCUC to order refunds to Nantahala's customers of $19 million[25] ($29 million with interest) — and a subsequent rate case has increased the refund obligation to $45 million.[26] As the North Carolina Supreme Court acknowledged, these reductions in Nantahala's allowable costs and revenue requirements "effectively allocated" additional costs to Tapoco and to Tennessee. App. 69a-70a.

The NCUC formalized this reallocation of costs by ordering Tapoco's Tennessee customer (Alcoa) to make the "refund" to the North Carolina customers. It reasoned that the $19 million refund in the instant case exceeds Nantahala's net worth and that it is therefore necessary that Alcoa,[27] whose Tennessee "manufacturing load" (App. 244a) was found to be the beneficiary of the NFA and 1971 Apportionment Agreements, fund the refunds to the extent that Nantahala may not do so without impairing its capital. App. 178a-179a.

[25] See NCUC Order Rejecting Nantahala's Proposed Refund Plan And Requiring Nantahala And Alcoa To File Joint Plan (May 4, 1982).

[26] See *North Carolina ex rel. Utilities Commission* v. *Nantahala Power and Light Co.*, 314 N.C. 246, 333 S.E.2d 217 (1985), jurisdictional statement pending, No. 85-1165 (filed January 10, 1986). Indeed, it appears that the North Carolina Supreme Court intends to require the continuing subsidization of North Carolina customers. See *North Carolina ex rel. Utilities Commission* v. *Edmisten*, 314 N.C. 122, 333 S.E.2d 453 (1985). Appellants will seek review in this latter case in a filing to be made with this Court on or before February 3, 1986.

[27] Alcoa was involuntarily made a party to these NCUC proceedings in 1980, after the case was remanded to it by the North Carolina Supreme Court, on the theory that Alcoa is a North Carolina "public utilit[y]" and part of the hypothetical Alcoa system. App. 9a, 232a. No serious attempt was made to square this finding with the exclusion of Alcoa's purchased power from the hypothetical rolled-in system. See p. 12 & n. 17, *supra*.

The North Carolina Supreme Court affirmed the NCUC order in a 132-page opinion. It held that the Federal Power Act permitted the NCUC "to do exactly what [it] has done in the instant case": make its own investigations of the appropriate interstate power arrangements and exclude from retail rates any costs that it finds were not reasonably incurred to benefit ratepayers in that State, but were assignable to customers in other States.[28] App. 84a; see *id.* 69a–70a. The North Carolina Supreme Court further held that the NCUC order was even-handed regulation with only an incidental effect on interstate commerce, and did not violate the Commerce Clause. App. 100a–106a.

SUMMARY OF ARGUMENT

This case presents the question of who is to have the effective authority to decide how the interstate wholesale costs of producing and transmitting electricity should be allocated between customers in different States: FERC, in the exercise of its explicit statutory authority to regulate these arrangements, or each of the affected States, in the exercise of their separate retail ratemaking responsibilities. Both the Federal Power Act and the Commerce Clause foreclose North Carolina's position.

1. The terms and purposes of the Federal Power Act make it very clear that state commissions must give effect to FERC's regulation in setting retail rates and are required to do what the NCUC refused to do here: include in the utility's North Carolina retail revenue requirements and retail rates all the costs that the local utility incurs as a result of FERC rate schedules and decisions. If the state commission believes that these rate schedules assign costs to its ratepayers that were not reasonably incurred

[28]The North Carolina Supreme Court's specific holding was that a North Carolina statute (N.C. Gen. Stat. § 62-133, App. 258a–261a) required this action and that this application of the statute was not preempted by the Federal Power Act. See App. 78a. For simplicity's sake, this Brief will use the phrase "North Carolina's actions," to refer to the statute, the rate order, and the judicial decisions upholding them.

for their benefit, the state commission's *exclusive* remedy is to exercise its explicit statutory right to file a complaint with FERC and seek modifications to these rate schedules. It may not simply exclude those costs from the utility's retail revenue requirements—as North Carolina did here. Any other rule would thoroughly subvert the operation of the uniform, orderly, and equitable scheme that Congress created.

This Court's prior decisions squarely reject North Carolina's position that, while States may not modify FERC rate schedules directly, they may act in ways that indirectly achieve the same result. For example, in ***Maryland* v. *Louisiana***, 451 U.S. 725, 749-50 (1981), the Court held that States are preempted from taking any action that has the "effect" of reallocating "the incidence" of costs between customers and "interfer[ing] with the FERC's authority to regulate the determination of the proper allocation of costs . . . ." That is what North Carolina did here.

More pertinent still are this Court's decisions requiring States to give effect to FERC rate schedules and preempting the application of any state laws that would have the "effect" of authorizing commerce on terms other than the rate on file with FERC. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-80 (1981); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251-52 (1951). This "filed rate doctrine" requires state utility commissions to include in a local utility's retail rates all the costs incurred under FERC rate schedules. If a state commission believes that some of these costs may not have been reasonably incurred to benefit ratepayers in that State, its sole remedy is to condition a rate increase on the provision of a refund to the extent FERC thereafter orders a wholesale rate reduction in a properly-instituted FERC proceeding.

State supreme courts have uniformly agreed. They hold that state commissions have no jurisdiction to investigate the interstate cost allocations and rate determinations that are subject to

FERC's jurisdiction. Whatever method a state commission adopts in setting retail rates, it must include all costs incurred under FERC rate schedules and decisions in retail revenue requirements and treat these costs as reasonable operating expenses. *E.g.*, *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978). These principles apply with the greatest force where, as here, FERC's regulation has resolved disputes between different States over the allocation of interstate wholesale costs among them. See, *e.g.*, *Northern States Power Co.* v. *Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S. Ct. 3546 (1984); *Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32 (N.D. 1981).

These decisions are clearly correct. A contrary rule would defeat the central purpose of the Federal Power Act by allowing States to burden commerce by separately pursuing "their respective local interests" at the expense of neighboring States. See *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90 (1927). Litigation of these issues in each affected State would also wholly "defeat[ ] . . . the federal objective of providing orderly and streamlined procedures for approval of wholesale transactions," *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696, 702 (N.H. 1985), and lead to the very "case-by-case" analysis of state action under the Commerce Clause that the Federal Power Act sought to avoid. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 380 (1983); *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214-16 (1964).

2. Even if North Carolina's actions were not preempted by the Federal Power Act, they violate the Commerce Clause. An analysis of the purpose and effect of North Carolina's actions demonstrates that there is no legitimate local interest that can justify North Carolina's attempts to adopt, for retail ratemaking purposes, different allocations of the interstate wholesale costs than are contained in the pertinent FERC rate schedules and decisions.

North Carolina's actions epitomize the severe interference with national commerce that it was the purpose of the Commerce Clause to prevent. Foremost, North Carolina's orders constitute blatant economic protectionism. Their purpose and effect were to give North Carolina citizens a "first call" preference to the economic benefits of a scarce resource: the low-cost hydroelectric power generated in a multi-state region. Under the NCUC's methodology, North Carolina customers will have the exclusive benefits to the low-cost power generated by Nantahala and Tapoco in North Carolina and Tennessee within eight years. This Court's decisions establish that such preferences are virtually invalid *per se*. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982).

Further, North Carolina is regulating an area of commerce in which the national interest is overwhelming: interstate wholesale sales and exchanges of power. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, *supra*, 461 U.S. at 377. It is beyond question that the effects of North Carolina's actions on this commerce are substantial — the interstate allocation of $45 million in costs is at issue — and North Carolina is regulating extraterritorially by imposing those costs on a manufacturing plant in eastern Tennessee. See *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642 (1982).

Conversely, the local interests that North Carolina has advanced are palpably insufficient to justify its regulation. While the protection of local ratepayers from "excessive costs" and "corporate abuses" is a legitimate interest, the overriding fact here is that FERC's regulation provides these "same substantive protections." *Edgar* v. *MITE Corp.*, *supra*, 457 U.S. at 644-45. North Carolina has no legitimate interest in collaterally attacking FERC's findings and imposing "protections" that go beyond FERC's. *Id.*

ARGUMENT

In this case, North Carolina and the Federal Energy Regulatory Commission made very different determinations of how the wholesale costs of generating and transmitting electricity should be allocated between customers in different States. The question presented in this case is not who is right and who is wrong about the underlying facts. Rather, it is who is to have the effective authority to make the determinations: FERC, under its explicit statutory authority to regulate these arrangements, or each of the affected States, under their separate retail ratemaking authority.

The Federal Power Act and the Commerce Clause provide very clear answers to this question. The Commerce Clause, by its own force, prohibits North Carolina actions here. *See* Part II, *infra.* However, Congress's affirmative exercise of its power under the Commerce Clause in the Federal Power Act eliminates any need for such a "case-by-case" analysis of the purpose and effect of North Carolina's actions on interstate commerce.

The Federal Power Act requires state commissions to accept FERC's exclusive jurisdiction over wholesale activities and do what North Carolina refused to do: include all the costs incurred as a result of FERC rate schedules and decisions in a local utility's retail revenue requirements and rates. If a state commission believes that a local utility is incurring costs that do not benefit ratepayers in that State, its *exclusive* remedy is to file a complaint with FERC and participate in the appropriate proceedings—as the North Carolina Attorney General did here. The State may not use its retail ratemaking authority to nullify FERC's jurisdiction. Otherwise, the orderly, equitable, and uniform regulation of interstate electricity transactions that Congress envisioned would be subverted. In its place would be a circumstance reminiscent of that which brought our national government to an end during the Articles of Confederation era: each State free to pursue its individual economic objectives without regard to the effect on other States.

I. North Carolina's Actions Are Preempted By The Federal Power Act.

The Federal Power Act was enacted because Congress, like this Court before it, recognized that the "uncontrolled state regulation" of the "production and transmission of energy" can "patently interfere with broader national interests."[29] Because these activities are "particularly likely to affect more than one State,"[30] state regulation would be an invitation to chaos. The reasonableness of the interstate wholesale transactions could be subject to litigation, and determinations, in multiple state commissions. Because all States would seek to advance "their respective local interests," the likely result would be inconsistent state determinations that would either prevent interstate wholesale producers from recovering all their costs or unfairly shift costs among affected States.[31]

Congress sought to prevent such interference with commerce by vesting the Federal Power Commission (now FERC) with exclusive jurisdiction to regulate the transmission and wholesale sales of electricity in interstate commerce. Congress drew "a bright line easily ascertained" to divide state and federal regulatory authority. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215–16 (1964). Under this "bright line," States are prohibited from regulating these bulk power supply arrangements among utilities, regardless of the actual "impact of state regulation upon the national economy." *Id.*

At the same time, Congress directed FERC to resolve disputes over the interstate allocations of costs and established an orderly,

[29] *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). See *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964); *Public Utils. Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

[30] *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n, supra,* 461 U.S. at 377.

[31] *Public Utils. Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89–90 (1927).

uniform procedure to make these and other wholesale rate determinations. Under Section 205 of the Act, every utility that provides electricity at wholesale in interstate commerce must file rate schedules showing all rates and charges, all classifications, practices, and regulations affecting such rates and charges, and all contracts affecting those rates and charges. 16 U.S.C. § 824d; App. 253a–256a. FERC is required to assure that these schedules are "just and reasonable." *Id.*

Because wholesale rates become costs for purposes of the retail rates that States regulate, the Act further gives a significant role to States and state commissions. "Any person, State, municipality, or State Commission" may file complaints with FERC seeking modifications in the rate schedules under Section 206 of the Act and may obtain judicial review of FERC decisions in federal courts of appeals. Federal Power Act, §§ 206, 306, 313; 16 U.S.C. §§ 824e(a), 825e, 825*l*(b); App. 256a–257a; Appendix to this Brief. There plainly would have been no need for these provisions if the federal remedies were not exclusive and if FERC's determinations were not intended to bind state commissions in the exercise of their retail ratemaking responsibilities. See *Massachusetts* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984).

North Carolina has conceded that these provisions prohibit States from directly regulating wholesale transactions in interstate commerce. The North Carolina Supreme Court upheld the NCUC's decision only because it said it was not modifying any contract or rate schedule that is regulated by FERC. App. 105a. However, North Carolina's refusal to allow Nantahala to recover the costs assigned to it by FERC achieves this same result indirectly—as North Carolina authorities have candidly stated.[32]

[32]For example, the NCUC acknowledged that it effectively modified the FERC-regulated rate schedules; it stated that its action was "nicely suited as a proper alternative to reformation of [the FERC-regulated] contracts." App. 202a.

1. This Court's previous holdings squarely foreclose North Carolina's assertion that States may "indirectly" regulate interstate wholesale transactions, whether by excluding costs that FERC regulates from retail rates or otherwise. They establish that the Federal Power Act preempts any state action or statute that can have the effect of "impair[ing] the Federal Commission's authority to regulate" wholesale sales in interstate commerce, either "directly or indirectly." *Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84, 90–92 (1963).[33] Thus, this Court has held that a wide variety of state laws, with far less direct consequences for FERC's regulation than the NCUC's, are preempted. *Id.*

For example, in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), this Court invalidated a state tax provision on this ground. While the state law did not directly alter a FERC rate schedule, the statute had the "effect" of "shifting the incidence of certain expenses" from the customers whom FERC has found should incur them to a different set of customers and would have "interfer[ed] with FERC's authority to regulate the determination of the proper allocation of costs associated with the [wholesale] sale[s]. . . . " *Id.* at 749–50. Because the NCUC order here nullified FERC's actual interstate allocations of costs between different customers for the only purpose for which they matter, *Maryland* v. *Louisiana* is dispositive.

Even more pertinent are the decisions that establish the "filed rate doctrine" by holding that FERC, and only FERC, has authority to take action that has the effect of modifying a rate that is subject to FERC's jurisdiction. This doctrine protects FERC's

[33]While *Northern Natural Gas* was a case under the Natural Gas Act (15 U.S.C. §§ 717–717w) rather than the Federal Power Act, this Court has stated many times that the "relevant provisions of the two statutes 'are in all material respects substantially identical' " and that it is the Court's "established practice" to "cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n. 7 (1981) (citations omitted).

exclusive jurisdiction by requiring that FERC rate schedules be treated as lawful in any proceeding and, specifically, by preempting any state law that would have the effect of "authoriz[ing] commerce in the commodity on other terms." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). A state law is preempted even if a court is of the opinion that a different rate "is the only or the more reasonable one." *Id.* at 252. For example, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578–80 (1981), the Court held that a state's law of contract remedies was preempted insofar as it would have the effect of permitting a utility to recover a higher price than was specified in the rate schedule that was then on file with FERC. Here, of course, the effect of the NCUC order was to authorize commerce on radically different terms than prescribed by the applicable FERC rate schedule, increasing Tennessee's costs by some $45 million. See App. 69a–70a, 244a.

Indeed, the applicability of the filed rate doctrine to this case could scarcely be clearer. FERC Nantahala Rate Schedule No. 1, as filed, determined Nantahala's costs of acquiring power for resale in North Carolina by allocating TVA entitlements capacity (54.3 mW) and energy (360 thousand mWh) to Nantahala. Because FERC had not modified this rate schedule at the time of the NCUC's decision, the NCUC's obligation was to include the costs incurred as a result of this rate schedule in Nantahala's retail rates, with the NCUC having the discretion only to make the rate increase subject to a refund to the extent that FERC thereafter modified the rate schedule in the then-pending complaint proceeding.[34] FERC Opinions 139 and 139A decided that the energy allocation should be increased to 404 thousand mWh, but held that the rate schedule was otherwise "just and reasonable." This necessarily established the new "filed rate" that itself became binding on the North Carolina courts and authorities. Under any view, the rate schedule and decisions foreclosed the

[34]See, *e.g.*, *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358, 1363 (1977), *cert. denied*, 435 U.S. 972 (1978); p. 10 n. 15, *supra*.

NCUC from setting rates, and the North Carolina Supreme Court from affirming them, on the ground that radically greater amounts of low-cost energy (433 thousand mWh) and low-cost capacity (91.1 mW) should have been allocated to North Carolina in 1975.[35]

2. North Carolina's position has also been uniformly rejected by a long line of state supreme court decisions. They hold that, under the Federal Power Act, a state commission may not exclude from retail revenue requirements and rates *any* of the costs that FERC's rate schedules and decisions assign to the utility's ratepayers in that State. The leading decisions are *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978); *Northern State Power Co. v. Minne-*

[35]For this reason, there is no substance to the North Carolina Supreme Court's suggestion (App. 91a–98a) that the NCUC could adopt its own radically different interstate allocations of power because FERC subsequently found the agreements "unfair" in Opinion Nos. 139 and 139A. Because FERC rejected the claims that there was any unfairness in the New Fontana Agreement, rejected the claim that the 1971 Allocation Agreement's assignment of 54.3 mW of low cost capacity was unfair, approved an allocation of 404 thousand mWh of energy, and rejected each of the elements of the NCUC's methodology (see pp. 11-14, *supra*), the preemption of the NCUC's actions could scarcely be more complete. The terms and purpose of the Federal Power Act cannot permit a State to use its retail ratemaking proceedings collaterally to attack pending or completed FERC proceedings.

To the extent the North Carolina Supreme Court was relying on the notion, which was urged in Appellees' Motion to Dismiss this appeal (pp. 15–16 n.19), that the FERC decision did not modify the rate schedules, but simply found the contracts to be "unfair" and somehow freed the States to adopt radically different allocations, the short answer to the claim is that it is foreclosed by Section 206 of the Federal Power Act. It provides that when FERC finds any rate to be unfair, FERC "shall determine the just and reasonable rate . . . to be thereafter observed and in force. . . ." App. 256a-257a. Moreover, FERC has also rejected appellees' claim. See Brief for the United States and Federal Energy Regulatory Commission As Amici Curiae In Support of Jurisdictional Statement (October, 1985), pp. 3–4 (FERC decided that "adjustments were required in the 1971 Apportionment Agreement to give a somewhat bigger share of the entitlements from TVA to Nantahala and decided how much that greater share would be").

sota Public Utilities Commission, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S. Ct. 3546 (1984); and *Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32 (N.D. 1981).

In *Narragansett*, the local utility's retail customers sought to avoid a rate increase by claiming that costs incurred under FERC rate schedules should not be included in retail rates. While the state commission conceded that it had no authority to set wholesale rates directly, it, like the NCUC, asserted that it could investigate the reasonableness of the FERC-regulated rate schedules and exclude from the local utilities' revenue requirements those wholesale costs the commission found to be "strikingly" or "glaringly unfair" to local ratepayers. The Rhode Island Supreme Court reversed. It reasoned that, while the States have the authority to determine the retail rates and revenue requirements on the basis of the local utilities' "overall financial structure," under the filed rate doctrine, the Federal Power Act fixes one component of the state commission's determination: it requires that all the costs incurred under FERC rate schedules or decisions must be treated as "an actual operating expense" and included in revenue requirements. 381 A.2d at 1363.[36] This is precisely what the NCUC refused to do here.

[36]It is because FERC's regulation determines only one aspect of the retail revenue requirements that the *Narragansett* court, and other courts, have held that an increase in the FERC regulated wholesale rates need not automatically result in a corresponding increase in retail rates. The reason is that there may be "savings in other areas [of the Company's business] which might offset the increased price for power." *Narragansett*, *supra*, 381 A.2d at 1363; *accord* cases cited at p. 28 n. 40, *infra*.

Contrary to the North Carolina Supreme Court's suggestion (App. 81a-82a), however, the fact that wholesale rate increases need not *automatically* be "passed through" to retail customers does not mean that some or all of the FERC-regulated expenses can be excluded from revenue requirements. To the contrary, *Narragansett* makes it explicit that this is what the Federal Power Act forbids:

> "[N]o matter what method [the state commission] adopts in considering [a retail utility's] proposed rate increase, it must treat the [FERC] filed and bonded purchase price as an actual operating expense." 381 A.2d at 1363.

The *Northern States* cases involved the very kind of interstate cost allocations that are present in this case. They arose from the abandonment of a nuclear power plant in Wisconsin, which could have been used to supply power in three States. The FERC rate schedules and decisions allocated these abandonment costs between these different States, but both the Minnesota and North Dakota commissions refused to include the local companies' allocated shares in their retail rates and revenue requirements. Each commission thought that the costs should have been allocated to Wisconsin. Both state supreme courts reversed. Despite the fact that no ratepayer had directly benefitted from abandoned plants, each state supreme court held that it would frustrate the purposes of Congress if costs imposed by FERC rate schedules could be investigated by state commissions and excluded from retail rates and revenue requirements. They held the only "proper procedure to determine the reasonableness and prudence of the [allocation of the abandonment] loss as it relates to wholesale charge between [North Dakota, Minnesota, and] Wisconsin" is to invoke the "remedies" available under the Federal Power Act;[37] in turn, state commissions are bound by explicit interstate cost allocations that FERC's regulation approves, either expressly or impliedly.[38] See also *Middle South Energy, Inc.* v. *Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985).[39]

These state supreme court holdings have been followed by numerous other state supreme courts. These other courts agree that States have no jurisdiction to investigate arrangements

[37]*Northern States Power Co.* v. *Hagen*, *supra*, 314 N.W.2d at 38.

[38]*Northern States Power Co.* v. *Minnesota*, *supra*, 344 N.W.2d at 380-82.

[39]*Middle South* presented an identical attempt by a State to avoid FERC's allocations of costs to it. There, the District Court held the Federal Power Act preempted the state actions, for the same reasons stated in *Northern States* and other cases. The Eighth Circuit, however, did not address the preemption issue because it wished to avoid a novel issue under the Public Utility Holding Company Act that is not presented here. 772 F.2d at 411. Instead, it affirmed the District Court in reliance solely on the Commerce Clause.

regulated by FERC and no power to prohibit the recovery of costs allocated to that State by FERC's regulation, regardless of the state commission's findings whether the costs benefitted local ratepayers.[40] State supreme courts have, without exception, rejected North Carolina's sweeping claims that States may exclude from retail rates costs that FERC's regulation has approved.[41]

[40]For example, when FERC approved rate schedules in which companies increased their wholesale rates to recover the payments made to the Gas Research Institute ("GRI") for a national research and development program related to natural gas, several state commissions sought to exclude the GRI charges from retail rates on the grounds that they benefitted the utilities' shareholders, but not local ratepayers. While state supreme courts each held that this wholesale rate increase need not necessarily lead to an increase in retail rates (see p. 26 n. 36, *supra*), they uniformly have held that state commissions may not investigate whether the GRI payments benefit local ratepayers and are required to treat the charges as reasonable operating expenses and include them in the retail utility's revenue requirements. *Public Serv. Co.* v. *Public Utils. Comm'n*, 644 P.2d 933, 939 (Colo. 1982); *Washington Gas Light Co.* v. *Public Serv. Comm'n*, 452 A.2d 375 (D.C. App. 1982), *cert. denied*, 462 U.S. 1107 (1983); see *United Gas Corp.* v. *Mississippi Pub. Serv. Comm'n*, 240 Miss. 405, 127 So. 2d 404 (1961); *Natural Gas Pipeline Co. of America* v. *Illinois Commerce Comm'n*, 33 Ill. 2d 214, 222, 210 N.E.2d 490, 494 (1965). See generally Hobelman, *The Narragansett Decision And Its Aftermath*, 6 Energy L.J. 33 (1985). The author of this article is the partner of some of appellants' counsel in this case.

[41]Other than the North Carolina Supreme Court's decision in this case, the only cases that even suggest departures from the *Narragansett* holding are *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696 (N.H. 1985), and *Pike County Light and Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, 77 Pa. Commw. Ct. 268, 465 A.2d 735 (1983). In each, the retail utility had purchased power from an affiliate under a contract regulated by FERC, but there was evidence that there were alternative, cheaper sources of power readily available and that the local utility had been imprudent in buying power from its affiliate at a higher price. Both cases hold that a state commission may exclude the excessive payments from the utility's revenue requirements *if*, and *only if*, FERC's regulation has not "expressly or impliedly" approved the utility's actions as in the public interest. *Appeal of Sinclair Machine Products, Inc.*, *supra*, 498 A.2d at 704. These decisions, too, reject North Carolina's position, for Nantahala's power acquisition arrangements were not only impliedly, but expressly, approved by FERC. Indeed, FERC's primary focus was to assure that the terms of the exchange of power were fair to Nantahala and its customers.

(Footnote continued on next page)

The interpretations of the Federal Power Act by the state supreme courts in *Narragansett*, *Northern States*, and other cases are clearly correct. As these decisions show, the Congressional objective in the Federal Power Act of adopting national solutions to interstate conflicts and problems requires that FERC-approved costs be recognized by local ratemakers as expenses for retail ratemaking purposes. Moreover, FERC agrees that this interpretation is essential to the implementation of the Act. It is settled that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).[42]

3. If States could investigate FERC's cost and rate determinations and exclude FERC-approved costs from retail rates, it would lead to the very burdens on commerce and duplicative proceedings that the Federal Power Act was enacted to prevent.

This Court need not decide whether *Sinclair Machine Products* or *Pike County* are correct. However, great care is required to assure that FERC's jurisdiction is not impaired by similar state commission orders. For example, while there may be a myriad of circumstances in which FERC would agree that local utility's power acquisition costs can be disallowed (see, *e.g.*, *Pennsylvania Power & Light Co.*, 23 FERC (CCH) ¶ 61,006, at 61,009 (1983)), there are others in which States could misconceive the purposes of FERC's regulation and make prudence determinations that subvert broader national interests. A disallowance order could lead the utility "to seek alternatives to the arrangement" that are "based not on the [overall] public interest, but on which alternative arrangement would best prevent dilution of the [utility's] fair return." *Appeal of Sinclair Machine Products, Inc.*, *supra*, 498 A.2d at 702; see p. 31, *infra*. While the issue is not presented here, this consideration suggests that a State may not disallow acquisition costs on the grounds that it was "imprudent" to contract to purchase power from one source, unless a filing has been made with FERC *and* FERC has made it explicit that it has not found the local utility's contractual arrangement to be prudent and in the overall public interest.

[42]*Accord*, *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545, 2551 (1985); *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422 (1983); *Schweiker* v. *Hogan*, 457 U.S. 569, 588 (1982); *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981).

Congress enacted the Federal Power Act to assure that individual States could not, by separately pursuing their "respective local interests," burden interstate wholesale sales of energy, which is commerce vital to the nation.[43] Yet if North Carolina is correct that individual States can set retail rates on the basis of their own determinations of how interstate wholesale costs should be divided between different States, these very burdens would result. Each State would have an irresistible incentive to adopt allocations of costs that would advance its "respective local interests" and "benefit its residents to the detriment of its neighbors."[44] And if States acted on these incentives—as they certainly would—the result would be inconsistent state regulations that would inhibit or prevent wholesale suppliers of power from recovering all their costs of generation and transmission.

For example, if Tennessee had regulated retail rates in that State on the basis of the same interstate allocation methodology that North Carolina adopted, the effect would be that Nantahala and Tapoco could recover only 70% of the production and transmission costs through wholesale and retail rates. Tr. Vol. 15, p. 119. The possibility that "uncontrolled state regulation" could impose such a shortfall on interstate power systems would severely inhibit and burden commerce that is vital to the nation. *Cf. Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983).

[43]Because States would have unavoidable incentives to act in this way, this Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89–90 (1927), that state regulation of interstate wholesale electric transactions is a *per se* violation of the Commerce Clause. By codifying this "bright line" in the Federal Power Act and declining to overrule *Attleboro* legislatively—as it could have, *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311 (1917); *accord*, *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545, 2551 (1985); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427–33 (1946)—Congress plainly intended to foreclose such interference with commerce under any guise.

[44]*Attleboro*, *supra*, 273 U.S. at 89–90; *Massachusetts* v. *United States*, 729 F. 2d 886, 888–89 (1st Cir. 1984).

North Carolina's position also would give rise to the very economic strife among States that the Commerce Clause sought to prevent. Here, for example, Tennessee has vehemently objected to North Carolina's actions, claiming that they adopt an explicit economic preference for North Carolina, shifting $45 million of costs to Tennessee. See, *e.g.*, App. 106a; p. 38, *infra*. Because Congress enacted the Federal Power Act to promote the historic objectives of the Commerce Clause (see p. 30 n. 43, *supra*), North Carolina's position would create the substantive evils that led to the Act.

North Carolina's position would also permit States to thwart FERC's regulation in subtler ways. If individual States could prohibit local utilities from recovering all the acquisition costs under FERC-regulated contracts, it would provide local utilities with substantial inducements to break the contracts that promote the overall public interest and seek out alternatives that do not. See *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696, 702 (N.H. 1985); pp. 28–29 n. 41, *supra*. The only way to preserve FERC's jurisdiction to assure that power supply arrangements promote the overall public interest, rather than the interests of individual States or groups, is to require state commissions to give effect to FERC rate schedules in retail ratemaking proceedings, subject of course to the outcome of FERC complaint and other proceedings in which States can participate. FERC can then make or oversee any necessary "delicate adjustments" required to coordinate power supply arrangements. *Cf. Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84, 93–94 (1963).

Further, the North Carolina position would mean that interstate rate and cost determinations would no longer be centralized in a single proceeding before a single disinterested federal forum. Rather, the question of whether costs were reasonably incurred, and how the costs should be allocated between different sets of customers in different States could be litigated once before FERC and, again, before each of the many state and municipal commis-

sions that could be affected by the relevant interstate transactions.[45] "Such a result defeats part of the federal objective of providing orderly and streamlined procedures for approval of wholesale transactions." *Appeal of Sinclair Machine Products, Inc., supra*, 498 A.2d at 702.

Indeed, the North Carolina position would do more than permit FERC's determinations to be relitigated, *ad infinitum*, in each of the affected States under traditional public utility standards. Each state commission's reallocation of interestate wholesale costs would be subject to challenge under the Commerce Clause. While the Commerce Clause may be readily applied to invalidate the state action in the instant case (*see* pp. 33–39, *infra*), state rate orders arise in an "infinite variety of cases," *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 390 (1983), and one purpose of the Federal Power Act was to avoid "the necessity" of the very "case-by-ease analys[e]s" under the Commerce Clause that North Carolina's position would require. *Id* at 380; *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215–16 (1964).

4. Against this background, there is no question that North Carolina's actions violate the Federal Power Act. The NCUC excluded from Nantahala's rates, and revenue requirements, millions of dollars in costs that FERC's regulation has established to have been reasonably incurred by Nantahala. The NCUC did so by adopting radically different interstate allocations of the low-cost power supplies than do the FERC rate schedules and decisions.

[45]For example, under North Carolina's position, the question of the appropriateness of one recent wholesale transaction, the System Agreement among the Middle South System companies, would have been subject to litigation in 6 forums: FERC, the Louisiana Public Service Commission, the Arkansas Public Service Commission, the City of New Orleans Council, the Mississippi Public Service Commission, and the Missouri Public Service Commission. See generally *Middle South Energy, Inc.* v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

Indeed, the preemption of North Carolina's actions could not be more complete: each aspect of the NCUC's methodology is contrary to the explicit findings and determinations that FERC made in the Section 206 complaint proceeding. See pp. 11–14, *supra*. Moreover, in making these findings, FERC addressed the arguments of the North Carolina Attorney General, by name, and rejected them. See, *e.g.*, App. 303a–307a.

In short, the Federal Power Act, and FERC's regulation thereunder, prohibit the NCUC from adopting a roll-in or any other device to defeat FERC's cost and power allocations to North Carolina and Tennessee.[46] No matter what method the NCUC adopted in setting Nantahala's retail rates, the Federal Power Act required the NCUC to include all the costs incurred as a result of FERC Nantahala Rate Schedule No. 1 and the pertinent FERC decisions in Nantahala's retail revenue requirements and retail rates.

II. The NCUC Order Violates The Commerce Clause.

Even if the Federal Power Act did not preempt North Carolina's actions, the Commerce Clause, by its own force, would prohibit North Carolina from attempting to impose cost and power allocations that are different from those contained in the FERC rate schedules and decisions. North Carolina's actions impose direct and substantial burdens on interstate commerce, and there is no local interest that can justify either its specific order or its assertion of authority to regulate the specific interstate cost recovery issues. See, *e.g.*, *Edgar* v. *MITE Corp.*, 457 U.S. 624

[46]The fact that North Carolina labeled its methodology a "roll-in" is of no importance to this case. State commissions cannot defeat FERC's power supply determinations and cost allocations by making findings that the "corporate veil" should be pierced, that entities should be rolled-in, or that any other labels be adopted. *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696, 706 (N.H. 1985); *United Gas Corp.* v. *Mississippi Pub. Serv. Comm'n*, 240 Miss. 405, 127 So.2d 404, 420 (1961); *Office of Public Counsellor* v. *Indiana & Michigan Electric Co.*, 416 N.E.2d 161, 164–65 (Ind. App. 1981); *cf.* pp. 11–12, n. 16, *supra*.

(1982) (whether or not state tender offer regulation is preempted by Williams Act, it violates Commerce Clause). Indeed, these very considerations recently led the Eighth Circuit to hold that the Commerce Clause prohibits a State from even investigating interstate cost allocations approved by FERC. *Middle South Energy, Inc.* v. *Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985).

The applicable standards for reviewing state regulation under the Commerce Clause are well-established. This Court must assess " 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.' " *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 390 (1983). As stated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970):

> "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142 (citation omitted).

Here, the balance between national and state interests is clear.

Impact on National Commerce. The NCUC order epitomizes the kind of state interference with interstate commerce that the Commerce Clause was intended to prevent.

Foremost, it is a stark, clear example of "the most serious concern identified in *Bruce Church*—economic protectionism."[47] "Economic protectionism" can be established either by an imper-

[47] *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, *supra*, 461 U.S. at 394.

missible purpose or impermissible effects. See *Bacchus Imports, Ltd.* v. *Dias*, 104 S. Ct. 3049, 3055 (1984); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). Here, both the purpose and the effect of the NCUC order is to give North Carolina an absolute preference to a scarce economic resource: the pool of low-cost hydroelectric power generated in North Carolina and Tennessee.

That this was the original purpose of the NCUC order is clear. Its decision responded to the earlier mandate of the North Carolina Supreme Court to give Nantahala's public customers, "in effect, [a] 'first claim' " to the low-cost hydroelectric power generated by Nantahala's facilities in North Carolina.[48] Indeed, the NCUC stated it was going beyond this mandate by also giving North Carolina customers a "first call" to the "total electrical energy" generation of Tapoco's facilities in Tennessee and North Carolina—with Tennessee to have only the "excess" power that remains after North Carolina's needs are met. As the NCUC stated:

> "[T]he allocation methodology that the Intervenors would have the Commission adopt [and that the Commission adopts] is based in all material respects upon the assumption that the electric energy requirements of the Nantahala-Tapoco combined system's North Carolina public load has first call on the total electric energy output of the combined system, and to the extent that said output exceeds the requirements of the North Carolina public load, such excess will be available for sale and will be purchased by Alcoa."

App. 182a–183a. Moreover, the NCUC thereafter reaffirmed these findings in January, 1982. App. 240a.

Since the issuance of this Court's decision in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, in February, 1982, however, North Carolina authorities have sought to disavow that the NCUC order had this purpose. See App. 101a–103a. These

[48] *North Carolina ex rel. Utilities Commission* v. *Edmisten*, 299 N.C. 432, 434, 438, 263 S.E.2d 583, 586, 588 (1980).

after-the-fact assertions cannot change the order's purpose. In any event, there is no doubt that North Carolina's actions have the effect of creating a first call preference for North Carolina. The NCUC order effectively gives North Carolina not only a far greater share of the low-cost power than does FERC's regulation, but also an *ever-increasing* share. This is because the North Carolina share increases proportionately as the needs of Nantahala's North Carolina customers increase. See p. 13, *supra*. Thus, as the sponsor of the NCUC order's methodology testified, the methodology assures that North Carolina will have all the low-cost hydroelectric power generated in the two States within eight years and that Tennessee will have none. See p. 11, *supra*. This epitomizes the economic protectionism that the Commerce Clause was designed to prevent. *New England Power Co.* v. *New Hampshire, supra;* see also *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

The North Carolina Supreme Court held (App. 100a–101a) that the NCUC was not guilty of protectionism because it did not actually block the physical exportation of low-cost power to Tennessee.[49] All it did, rather, was secure the economic benefits of the low-cost power for North Carolina's citizens alone. For Commerce Clause purposes, this is a distinction without a difference, and North Carolina's position was rejected in *New England Power Co.* v. *New Hampshire, supra.* There, the State did not prohibit the physical exportation of cheap hydroelectric power by "order[ing] New England Power to sever its connections" with the interstate grid. 455 U.S. at 336. Instead, it sought to impose wholesale rate schedules that would give that States' citizens the exclusive economic benefits of the hydroelectric energy generated in that State. *Id.* at 336; see also *id.* at 343–44 n.10. This is precisely what North Carolina has attempted here. Moreover, North Carolina has gone a step further than did New Hampshire.

[49]The North Carolina Supreme Court also noted that the State had not physically appropriated the low-cost power generated in Tennessee. App. 100a–101a.

By seeking also to appropriate the benefits of hydroelectric power generated in Tennessee, North Carolina has carried protectionism to new heights.

Further, North Carolina is directly regulating an area of almost exclusively national concern: interstate wholesale sales and exchanges of power between two States. While modern principles of Commerce Clause jurisprudence no longer treat wholesale power sales as *per se* beyond the power of state regulation to affect, they reiterate the overriding national interest in such commerce; state regulation that directly affects interstate power exchanges must withstand careful scrutiny to be valid. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 377-79, 390, 393 (1983); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).[50] This consideration is acute here because North Carolina has not just inhibited sales from North Carolina to Tennessee, has not just prohibited a local utility from recovering all its power acquisition costs, and has not just appropriated the economic benefits of power generated in Tennessee. It has forced an out-of-state, Tennessee manufacturing plant to subsidize North Carolina ratepayers by allocating $45 million in costs to the "Alcoa manufac-

[50]*Arkansas Electric Cooperative Corp.* overruled *Attleboro's* holding that state regulation of interstate wholesale sales of power is *per se* invalid, on the ground that this *per se* rule is inconsistent with modern day doctrine. At the same time, *Arkansas Electric Cooperative Corp.* emphasized that the considerations underlying the "line" drawn in *Attleboro* "would undoubtedly lead in a large number of cases to results entirely consistent with present-day doctrine" and are a "healthy counterweight in many contexts to an otherwise too-easy dilution of guarantees contained in the Constitution." 461 U.S. at 393. Indeed, in upholding state regulation in that case, *Arkansas Electric Cooperative Corp.* emphasized that what was almost exclusively at issue there were *intrastate* wholesale sales. *Id.* at 395. Lower courts have thus acknowledged the continuing importance of *Attleboro* and its predecessors to Commerce Clause jurisprudence. *Baltimore Gas and Electric Co.* v. *Heintz*, 760 F.2d 1408, 1420-21 (4th Cir.), *cert. denied*, 106 S. Ct. 141 (1985).

turing load" (App. 244a) and requiring it to "refund" these amounts to North Carolina customers. North Carolina's actions thus impose a "direct restraint on interstate commerce [with] a sweeping extraterritorial effect." *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642 (1982).

Beyond question, North Carolina's actions have a substantial, and not an incidental, effect on interstate commerce. It is for this reason that Tennessee has urged, repeatedly, that North Carolina's actions of, in its words, "effectively allocat[ing]" $45 million in costs from North Carolina to Tennessee (App. 69a-70a) will have serious adverse repercussions for the economy in eastern Tennessee. See App. 106a; Brief of Tennessee As Amicus Curiae In Support Of The Jurisdictional Statement (October, 1985).

The Local Interests. The burden and interference with interstate commerce being clear, the remaining question is whether North Carolina's decision to make its own determination of how interstate wholesale costs should be allocated and recovered advances any legitimate local interests that are sufficiently compelling to outweigh these burdens. The state interest in engaging in this regulation must be assessed against the background of the protections that federal law already provides. *Edgar* v. *MITE Corp.*, 457 U.S. at 644-45 (1982); see *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, *supra*, 461 U.S. at 393 (emphasizing inportance of absence of federal regulation in that case).

Here, North Carolina's regulation is designed to protect local ratepayers. It seeks to assure that its retail ratepayers are not saddled with costs that were not reasonably incurred for their benefit, but that, instead, were incurred to benefit an Alcoa plant in Tennessee. In this regard, North Carolina also wants to assure that "corporate abuses" are not permitted to lead to the same result.

While the protection of local ratepayers is a legitimate interest, the overriding fact is that the Federal Power Act provides the "same substantive protections" with respect to the interstate cost allocations at issue. *Edgar* v. *MITE Corp.*, 457 U.S. at 644-45. Indeed, the Federal Power Act did more than give FERC jurisdiction to apply the same basic principles of utility law that North Carolina has invoked. It provided the Attorney General, and its citizens, with a fully adequate remedy to prevent unfair and unreasonable costs allocations. A disinterested forum, FERC, has considered, and rejected, each of the specific factual allegations that underlie the claim that North Carolina ratepayers were being assigned excessive cost burdens—in an extensive proceeding in which the North Carolina Attorney General represented its citizens' interests.

While North Carolina's ratepayers, to be sure, have an interest in having an interested forum revisit these issues and adopt different findings and protections that "go beyond" FERC's, this interest cannot be sufficient to authorize the direct and substantial interference with interstate commerce that is presented here. See *Edgar* v. *MITE Corp., supra*, 457 U.S. at 644-45. States do not, and cannot, have a carte blanche collaterally to attack any judicial or administrative determination that disadvantaged its residents, and favored out-of-state interests. This is especially so because the reallocations that North Carolina has made are the kinds of explicit economic preferences that are virtually *per se* illegitimate. See *Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 627.

CONCLUSION

For the reasons stated, the decision and judgment of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*(b) provides as follows:

§ 825*l*. Review of orders

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy or such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.